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No. 79-1583

(Consolidated with No. 79-1429)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL COTTON COUNCIL OF AMERICA,
Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER, NATIONAL COTTON COUNCIL OF AMERICA

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STATEMENT OF THE CASE

More complete statements of the case are set forth in briefs on the merits filed by Petitioners. The statement here presents only those facts germane to this Reply Brief.

The Occupational Safety and Health Act[1] requires the Secretary to "set the standard which most adequately assures, *to the extent feasible,* on the basis of the *best available evidence,* that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." (Emphasis added) 29 U.S.C. § 655(b)(5).

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[1]29 U.S.C. §§ 651, *et seq.*

Section 6(f) of the Act provides that, upon judicial review, the determinations of the Secretary shall be conclusive, and the standard upheld, only if supported by "*substantial evidence* in the record considered as a whole." (Emphasis added) 29 U.S.C. § 655(f).

The dispute addressed in this Reply Brief centers on OSHA's treatment of the compliance cost evidence in the record and whether OSHA's economic feasibility determination for the Cotton Dust Standard in question was supported by substantial evidence in the record considered as a whole.

ARGUMENT

I. OSHA's Estimate Of The Cost Of Complying With The Standard It Promulgated Is Unsupported By Substantial Evidence In The Record Considered As A Whole.

OSHA's counsel would have this Court believe that the agency carefully reviewed two cost estimates placed in the record by experts,[2] rejected both, and then fashioned an independent estimate of its own that was more accurate than either of those in the record. Secretary's typewritten Brief at 14 and 68. Further, the agency's counsel asks the Court to accept the incredible proposition that OSHA's "independent estimate" of the cost of complying with the severe Standard it issued turned out to be exactly the same as the Hocutt-Thomas estimate of the cost of complying with a far less stringent standard. Secretary's typewritten Brief at 68.

In support of this stance, counsel has advanced no new argument, but has simply restated the misplaced rationale espoused in the lower court — a rationale NCC showed to be constructed by counsel post hoc and to be unsupported by substantial evidence in the record considered as a whole. NCC's Brief at 8-16.

Counsel's claim to support of the record is simply the agency's stated conclusion that the industry's estimate[3] was "more realistic" than its own contractor's, but that it, nevertheless, did not accept the technological assumptions underlying

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[2]One by OSHA's own contractor, Research Triangle Institute (RTI), and the other by Hovan Hocutt and Arthur Thomas, representatives of dust and temperature control manufacturers.

[3]OSHA's reference to "industry estimates" is to the Hocutt-Thomas estimate. Hocutt and Thomas represent manufacturers of dust and temperature control equipment. They do not represent the textile industry.

the industry's estimate. Secretary's typewritten Brief at 68, footnote 68. Therefore, the industry's estimate was considered wrong for the cost of complying with the PEL's on which the estimate was premised but right for complying with the much lower PEL's mandated by OSHA's Standard.

NCC has shown that these criticisms of the two cost estimates in the record are, themselves, unsupported by evidence of record and cannot be converted into a finding by the agency that the Hocutt-Thomas estimate somehow, magically, is the cost of complying with the stringent Standard promulgated. NCC's typewritten Brief at 8-16. OSHA's "independent estimate" of the Standard's compliance cost clearly is not based on the best available evidence. *Id.* Accordingly, OSHA has made no valid estimate of the Standard's compliance cost and the agency's economic feasibility determination fails to comply with the substantial evidence test required by 29 U.S.C. § 655(f).

II. OSHA's Economic Feasibility Determination Is Unsupported By Substantial Evidence In The Record Considered As A Whole.

While OSHA rejected RTI's estimate of compliance costs, it purports to accept RTI's findings concerning the Standard's economic impact on the industry. Secretary's typewritten Brief at 20, footnote 27. But the agency and its counsel continue to misconstrue RTI's economic feasibility findings.

For example, RTI found that capital costs of $211.8 million (for a 0.5 mg/m^3 standard in yarn production) and $984.4 million (for a 0.2 mg/m^3 standard in yarn production) would add 1.7¢ to 7.8¢ of cost per dollar of sales generated across six textile industry sectors affected by the Standard. Exhibit 6, No. 76 at VI-24. OSHA *said* RTI found these costs to be "small." Secretary's typewritten Brief at 20. But "small" is *OSHA's* interpretation of the significance of the costs, not RTI's. RTI made it clear that the six textile industry sectors would be expected to incur varying degrees of compliance costs:

> . . . requirements vary significantly among the six sectors, ranging from 0.1¢ to 55.3¢ per dollar of sales, because for all these sectors the revenues derived from cotton yarn spinning processes make up only a part of total industry shipments. Ex. 6, No. 76 at VI-24.

The majority of cotton is consumed in industry 2211,[4] where RTI found the cost per dollar of revenue to meet a 0.5 mg/m³ standard to be 4.2¢ per dollar of sales but the cost to meet a 0.2 mg/m³ standard (i.e., the Standard finally promulgated for yarn production) to be 19.4¢ per dollar of sales. Ex. 6, No. 76 at VI-24.

These costs per dollar of sales for industry 2211 are much higher than those cited in OSHA's Brief, which include cost/dollar sales relationships for industry sectors that generate a high percentage of their sales revenue from products *other* than cotton textiles. However, cost figures take on significant meaning only when related to an industry's ability to finance the cost. Accordingly, RTI's comparison of costs to *profits* is revealing. RTI found:

> The exposure limit of 0.2 mg/m³ will require compliance capital expenditures in excess of 300 percent of annual profit after taxes for all size classes of companies in SIC Code 2211 . . . Ex. 6, No. 76 at VI-46, J.A. 109-110.

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[4]Industry 2211 is the Department of Commerce code assigned to the manufacturing sector termed "Weaving Mills, Cotton." The majority of the establishments in industry 2211 spin the yarns which they subsequently weave into fabric. RTI estimated that 52 percent of the cotton consumed in the six sectors in question was consumed in industry 2211, (i.e., 2.076 billion lbs. ÷ 3.8369 lbs. = 52 percent). Ex. 6, No. 76 at VI-19, Table VI-4a. In contrast, only 21 percent of the six sectors' *sales* were attributed to industry 2211 (i.e., $2.6606 billion ÷ $12.6068 billion = 21 percent). Ex. 6, No. 76 at VI-21, Table VI-5, J.A. 96.

RTI further concluded:

> The evidence . . . clearly indicates that unless the compliance capital investments are spread over a substantial number of years, *all* the com;panies engaged heavily in cotton yarn production will face severe difficulty in financing compliance capital for the 0.2 mg/m³ and 0.1 mg/m³ exposure limits and the difficulty will be more intense for the smaller companies. (Emphasis added) Ex. 6, No. 76 at VI-48, J.A. 112.

RTI also observed:

> Two sectors, SIC Code 2211 (Weaving Mills, Cotton) and SIC Code 2281 (Yarn Mills, Except Wool), in particular, and to some degree SIC Code 2221 (Weaving Mills, Manmade Fiber and Silk), will have severe problems in acquiring compliance capital necessary to meet the 0.2 mg/m³ exposure limits. Ex. 6, No. 76 at VI-49, J.A. 112.

OSHA cannot, therefore, rely on RTI's findings to support its economic feasibility determination. RTI termed neither $211.8 million nor $984.4 million as "small," as OSHA infers. To the contrary, as the above quotations from RTI's study indicate, OSHA's contractor saw the financial impact of a standard with PEL's at levels mandated by the final Standard to be severe by any fair interpretation of its findings.

Aside from the above misinterpretation of RTI's findings, the agency claims:

> RTI judged competition from synthetics not to be significant. Synthetics had penetrated the market to its limits and there remained an *irreducible* demand for cotton products. (Emphasis added) Secretary's typewritten Brief at 20.

Significantly, OSHA's Brief does not provide a direct citation to RTI's study in support of this naive conclusion. Nor does the

Brief's citation to the Federal Register provide record support for such a totally inaccurate conclusion.[5]

Even if RTI *had* reached the conclusion that synthetic competition is insignificant and that cotton demand is irreducible, the record — including RTI's own description of the status of cotton consumption and interfiber competition (Ex. 6, No. 76 at C-35-37 and 40-53) — is unsupportive of any such conclusion. RTI, in fact, found that a capital cost of $2,696,500,000 would reduce annual cotton consumption in U.S. mills by 150,303,000 pounds (about 313,000 bales) and that a $255,100,000 capital cost would reduce annual consumption by 16,081,000 pounds (about 33,500 bales). Ex. 6, No. 76 at VI-106, Table VI-31. Even if OSHA disagrees with RTI's estimate of compliance *cost*, it can hardly conclude from this finding that cotton demand is irreducible.

As the American Farm Bureau Federation observes, not only is cotton's share of mill fiber consumption reducible, but the competitive effects of OSHA's Standard may already be evidenced:

> For four straight years immediately preceding publication of OSHA's proposed cotton dust standard, cotton had stabilized its share of the U.S. mill fiber consumption at about 29 percent. But, with publication of the proposed very severe standard, cotton's market share began to slip. In 1979, cotton's share of U.S. mill fiber consumption was 6.4 million bales. If cotton had retained its pre-dust-standard market share, 1979 consumption by U.S. mills would have been 7.5 million bales. (Footnote references in quoted material are omitted) Brief of American Farm Bureau Federation as Amicus Curiae at 9-10.

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[5]An observation that it is "unlikely that *complete* substitution of synthetic fibers would ever occur" (emphasis added; see OSHA's citation to 43 Fed. Reg. 27350), is a far cry from record support for a conclusion that cotton demand is "irreducible."

This reduction in market value and market share should not be surprising. It was, in fact, predicted in the testimony of John S. Barr, III, who observed that RTI's economic impact estimate was a highly conservative one because RTI (1) used inappropriate elasticity coefficients and (2) failed to account for the Standard's adverse impact on cotton textile trade. Ex. 101 at 4-7, J.A. 327-330.

In its Brief, OSHA defends RTI's use of short term price elasiticity of demand coefficients on the basis that long term coefficients were unavailable. Secretary's typewritten Brief at 22, footnote 29. While OSHA may consider that to be sufficient reason for not using the right coefficients, it is *not* sufficient reason to use the *wrong* ones, nor to suggest that the results obtained thereby are accurate.

OSHA has persisted in ignoring the testimony presented by USDA's Economic Research Service, whose elasticity coefficients RTI misused. USDA warned that the use of short term elasticity coefficients to measure the impact of price changes that occur over the longer term result in a substantial understatement of the Standard's impact on the cotton industry:

> . . . we believe that the inflationary impact analysis conducted by the Research Triangle Institute substantially underestimates the price impact on cotton consumption of implementing the proposed new regulations. The erroneous use of elasticities designed only for short-run use is primarily responsible. . . . Consequently, based on the increased costs of implementing the proposed cotton dust standards and their impact on cotton prices, we believe that consumption will fall much sharper than envisioned in the inflationary impact statement. Thus, the economic impact on the cotton industry will be much more severe. Ex. 92C at 2-3, J.A. 325-326.

RTI semmingly understood the competitive and technological factors which would invalidate interfiber competition results computed with short term elasticity coefficients. In its economic impact study for OSHA, RTI observed:

> In order for cotton and man-made fiber to compete directly on the basis of price, shifts back and forth between them must be easily made at all levels between producer and consumer. The USDA study points out that ". . . at the mill level, it is difficult and time-consuming to change from production of 100 percent man-made fiber to production of 100 percent cotton fiber, or vice versa. Major difficulties may even be encountered in shifting from production of man-made fiber-cotton blends to production of 100 percent cotton fabrics. All of one fiber must be run out of the machines which are changing fiber and the machines must be thoroughly cleaned. This is a major undertaking and, naturally, quite time-consuming. During the change, neither labor nor machines operate at peak efficiency. So, once a mill shifts from cotton to man-made fiber in response to an anticipated price or supply movement, it is unlikely that the change will be reversed unless planners at the individual mill level feel they must do so to avert a severe profit squeeze or to respond to strong consumer demand. This explains in part the difficulty cotton experiences when attempting to recover markets in a specific end-use once it has been displaced. Ex. 6, No. 76 at C-40, 42, J.A. 142-143.

In spite of this apparent awareness of the limitations of short term elasticity coefficients to measure price impact that accrues over the long term, RTI nevertheless used them. This, according to USDA, results in a substantial understatement of the Standard's economic impact on the cotton industry. Ex. 92C at 2-3, J.A. 325-326.

Also without merit is OSHA's further attempt to justify RTI's use of short term coefficients on the basis that, in RTI's judgment, ". . . competition from synthetics and imports was not significant." Secretary's typewritten Brief at 22, footnote 29. OSHA provides no citation to RTI's study to confirm that its contractor made this judgment. Petitioner has already shown that RTI, in fact, made no such judgment with regard to synthetic fiber competition. Neither did RTI's study find that the Standard's impact would be insignificant with regard to textile trade. OSHA quotes RTI as saying that *small* changes in the relative prices of domestic and foreign textiles would have "very little impact" on the domestic textile industry. Secretary's typewritten Brief at 21. But, in the sentence preceding OSHA's quotation, RTI said:

> *Large* changes in the relative prices of domestic and foreign textile and apparel products *do* have an impact upon the domestic textile industry; the dollar devaluations caused an observable response. (Emphasis added) Ex. 6, No. 76 at C-53, J.A. 150.

So, RTI's conclusion was that "large" changes in the relative prices of domestic and foreign textile products *do* have an impact on the domestic textile industry while "small" changes *do not*. The only clue as to what would constitute a large change versus a small change is contained in RTI's observation that the "dollar devaluations caused an observable response."[6] Beyond those observations, RTI concluded nothing about the effects of the Standard on cotton textile trade. During cross examination, RTI's Dr. David LeSourd said:

> . . . we confined our analysis to a *discussion* of the foreign trade issues, the factors affecting it and we *did not attempt to quantify* the resultant changes . . . (Emphasis added) Tr. 596, J.A. 417.

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[6]The response that is here termed "observable", RTI had previously called "significant." Ex. 6, No. 76 at C-52, J.A. 150.

The key, then, to RTI's findings about the Standard's impact on cotton textile trade lies in a determination of whether the price increase the Standard would require in domestically produced cotton textiles is "large" or "small" in the sense of RTI's study. The testimony of John S. Barr, III provided some perspective on that question.

Mr. Barr testified that the monetary changes, which RTI found to have had a "significant effect upon foreign trade of U.S. textile products" (Ex. 6, No. 76 at C-52, J.A. 150), amounted to a 7.5 or 8.5 percent change in the price of U.S. cotton textiles. Ex. 101 at 7, J.A. 330. By comparison, RTI found that a $2.69 billion compliance cost would require a price increase in American-produced cotton textiles of 18 percent. Ex. 6, No. 76 at VI-92, Table VI-24. Even if the Standard's capital cost were only half that much, it is clear that the required price increase would exceed the percentage change in monetary values which RTI observed had produced a significant effect on textile trade.

OSHA leans on one other RTI observation in an effort to show that the Standard's cost will not affect textile trade significantly — i.e., RTI's recognition that quota limitations restrict textile import growth from some countries to 6-7 percent a year. Secretary's typewritten Brief at 21. This argument pales in the face of historical data indicating a 2.5 percent average annual *decline* in the consumption of cotton by U.S. mills.[7] It is illogical to conclude that quotas restraining import *growth* to 6-7 percent a year are sufficient to keep import competition insignificant in a domestic market that is *declining* at a 2.5 percent annual rate.

OSHA has attempted to fabricate record support for its economic feasibility determination where there is none. The

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[7]Ex. 6, No. 76 at C-36, Table C-20. For the period 1964-1974, consumption of cotton by U.S. mills dropped from 4,286,900,000 pounds to 3,309,000,000 pounds, an average annual decline of 2.5 percent.

agency's argument that the Standard is affordable hinges on the misplaced assumption that compliance costs can be passed on to the consumer with no significant damage to cotton textile markets. Secretary's typewritten Brief at 22. NCC has shown herein and in its Brief on the merits at pages 15-25 that the assumptions underlying this position are faulty.

Contrary to OSHA's claim, its economic feasibility determination lacks support of the record and fails to meet the requirements of Section 6(f) of the Occupational Safety and Health Act. 29 U.S.C. § 655(f).

CONCLUSION

OSHA has exceeded its rulemaking authority and the judgment of the court below should be reversed.

Respectfully submitted,

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